No. 85-1132

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROSENTHAL & ROSENTHAL INC. and
BROADWAY 41ST STREET REALTY CORPORATION,
Petitioners,

—v.—

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION; and GEORGE E. KLEIN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In the wake of this Court's decision in *Hawaii Housing Authority v. Midkiff*, ____ U.S. ____, 104 S.Ct. 2321 (1984), commentators have concluded that the Court has effectively precluded judicial review of whether a local government's decision to condemn private property is constitutional. Consistent with this analysis, the lower courts in this case dismissed, for failure to state a claim, a complaint that alleged that petitioners' building was being condemned not for a public purpose, but arbitrarily and capriciously for the private benefit of a politically influential real estate developer. The issues raised by this dismissal are the following:

1. Are the lower courts and commentators correct that *Midkiff* precludes effective judicial review of condemnation decisions, or is their analysis inconsistent with *Midkiff* itself, which expressly states that there is a role, albeit limited and deferential, for the courts to play in determining whether takings are constitutional?

2. Assuming the Court decides that there remains a role for judicial review in condemnation cases, what standards should the courts apply in distinguishing condemnations that are lawful from those that are not?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Mario Cuomo, as Governor of the State of New York, was a party to the action in the district court. Petitioners agreed to dismiss Governor Cuomo from the appeal.

STATEMENT PURSUANT TO RULE 28.1

The parent company of petitioner Rosenthal & Rosenthal Inc. is Rosenthal, Inc., which is privately held. Petitioner Broadway 41st Street Realty Corporation has no parent corporation but is held by a non-public trust for the benefit of the Rosenthal family.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Rosenthal & Rosenthal Inc. ("Rosenthal") and Broadway 41st Street Realty Corporation petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, la-5a) is reported at 771 F.2d 44. The opinion of the district court (Appendix D, *infra*, 10a-23a) is reported at 605 F. Supp. 612.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, 6a-7a) was entered on August 26, 1985. A timely petition for rehearing and suggestion of rehearing en banc was denied October 8, 1985. (Appendix C, *infra*, 8a-9a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. AMEND. V

". . . nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. The Underlying Facts[1]

The constitutional issues in this case arise in the context of a proposed multibillion dollar urban redevelopment project,

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1 The following recitation of facts is drawn both from the Complaint and, because petitioners were denied discovery prior to the hearing on respondents' motions to dismiss, from documents submitted to the district court as exhibits to petitioners' memorandum of law in opposition to the motions to dismiss. At oral argument, petitioners offered to amend their Complaint to incorporate the supplementary information set forth in their memorandum as facts they would hope to prove after discovery and trial. The district court's opinion treated these supplementary allegations as part of petitioners' Complaint.

known as the 42nd Street Development Project ("the Project") that has been jointly planned by respondents New York State Urban Development Corporation ("UDC") and the City of New York ("City"). If consummated, the Project would level existing buildings in the historic Times Square area and replace them with a new merchandise mart, a high-rise hotel, and four new office towers ranging in height from 29 to 56 stories. Respondent Park Tower Realty Corporation ("Park Tower"), of which respondent George E. Klein is the president and principal stockholder, has been chosen by the UDC and City to build the new office towers. To make way for one of these new buildings, petitioners' building (hereinafter the "Rosenthal Building") will be condemned and demolished, notwithstanding the fact that the Rosenthal Building, which is not located on the single block of West 42nd Street that the respondents claim is "blighted," is structurally sound, fully occupied, attractively furnished, and not substandard in any respect.

The ostensible goals of the respondents' Project are "to eliminate blight on 42nd Street between Broadway and Eighth Avenue, to revitalize this vital cross-road and integrate it into the theatrical, cultural and commercial life of the City." Complaint, ¶ 16 (28a). Petitioners have alleged a radically different view of the Project's intended purpose and effect.

Petitioners' Complaint alleges that "[t]he planned taking of the Rosenthal Building is neither for a public purpose, nor rationally related to a public purpose, as required by the Fifth and Fourteenth Amendments to the Constitution of the United States." Complaint, ¶ 20 (29a). Specifically, the Complaint alleges that if the Project is implemented, the present site of the Rosenthal Building will not be used for a public or governmental purpose, but will instead continue to be used as the site of a private office building that will be financed, constructed, managed and operated by Park Tower. This office building will be nothing more than a typical commercial enterprise, with Park Tower selecting the tenants, collecting the

rents, and paying operating expenses. Complaint, ¶¶ 21, 22 (29a-30a).

The Complaint further alleges that the proposed taking of the unblighted and structurally sound Rosenthal Building is not "rationally related" to the Project's stated goal of eliminating blight several blocks away on 42nd Street. Complaint, ¶ 23 (30a). The site occupied by the Rosenthal Building is not needed to achieve the Project's goals. The only conceivable connection between the proposed condemnation and the Project is financial, in that Park Tower has agreed to share a portion of its income from its new office buildings with the City and UDC to subsidize theater renovations and subway entrance improvements in the area of the Project. The Complaint alleges that, as a matter of law, this use of the eminent domain power as an indirect means of raising revenue for the government, rather than to obtain real property necessary for a public purpose, is not a valid Taking. Complaint, ¶ 24 (30a).

The Complaint further alleges that the selection of the site of the Rosenthal Building, rather than some other site, as the location of one of the new office towers was not rational, but was instead "completely arbitrary and capricious." Complaint, ¶ 25 (30a). While attempting to condemn petitioners' sound, economically viable building on an unblighted block at the edge of the Project, the respondents have excluded from the Project, and chosen not to condemn, replace, or rehabilitate, a large, rundown office building, the Candler Building, which is located within the Project's boundaries in the middle of the 42nd Street block that the respondents claim is blighted. The only apparent reason for not condemning the dilapidated, largely vacant Candler Building in connection with the Project is political favoritism; at the time the Project was conceived, the Candler Building was owned by a partnership including Michael J. Lazar, a former Taxi and Limousine Commissioner of the City of New York.[2]

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2 Since the district court entered its judgment herein, Mr. Lazar sold the Candler Building by deed dated January 4, 1985, for $14.75

Further evidence that the Project is structured for the benefit of politically influential private developers, rather than for a public purpose, is provided by the extraordinary lengths to which officials of the State and City went to assure that respondent George Klein, a substantial contributor to the political campaigns of defendant Mayor Edward Koch, obtained what they felt was his fair share of the Project's bounty.[3]

This intense political maneuvering is understandable in view of the profits the Project will generate for those developers fortunate enough, or politically well-connected enough, to participate in it. The value of the tax abatements and other incentives given to Park Tower has been estimated to be at least $650 million. In return, Park Tower is asked only to make a comparatively insignificant contribution of approximately $35 million to assist with theater restoration and subway entrance improvements.

In sum, petitioners alleged that respondents' talk of "eliminating blight on 42nd Street" is a smokescreen.[4] The

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million, which is $13.45 million more than he paid for it in 1980. Mr. Lazar will reap further benefits from this Project because he has also been designated by the UDC and City to participate in the renovation of a number of 42nd Street theaters, notwithstanding his lack of experience in the theater industry.

3 In August, 1983, the City of New York announced that it would withdraw from the Project and redevelop the Project area itself, because the UDC had rejected the City's choice of respondents Park Tower and Klein to develop a merchandise mart to be included in the Project. The Project was salvaged only after an extraordinary "summit" meeting between respondent Koch and Governor Cuomo.

4 The atmosphere of "blight" which respondents claim to have found on West 42nd Street has little to do with the state of repair of the buildings found on that block; rather, respondents' claim that the block is blighted is based primarily on the nature of the activities carried on in the street around those buildings, i.e., prostitution, pornography, drug sales and street crime. However, respondents have recognized that the Project will not eliminate the unsavory activities that occur on 42nd Street, which are the result of inadequate police enforcement rather than physical conditions. The Project will simply

Project is, in truth, a private real estate development for the benefit of politically influential individuals.

B. The Proceedings Below

Petitioners filed their Complaint, (Appendix F, *infra*, 25a-32a), in the United States District Court for the Southern District of New York on October 9, 1984. The complaint sought to enjoin respondents from commencing condemnation proceedings and from otherwise seeking to take petitioners' property involuntarily in connection with the Project. Jurisdiction was founded on 28 U.S.C. § 1331. All respondents made motions to dismiss. On January 8, 1985, the district court (Motley, Ch. J.) issued its Opinion granting these motions, and dismissed the Complaint for failure to state a claim upon which relief can be granted. (10a-23a).

Despite the absence of an evidentiary record, the district court concluded that the Project itself and the taking of petitioners' property served a "substantial, legitimate public purpose." (19a). In reaching this conclusion, the court accepted respondents' assertions of public purpose and failed to address, deeming them legally irrelevant, petitioners' allegations that the Project and the taking of the Rosenthal Building were arbitrary and capricious. Similarly, the court summarily dismissed petitioners' allegations that the Rosenthal Building will be taken only to subsidize certain public improvements connected with the Project. The court's failure to subject the proposed taking to even a modicum of judicial review was evidenced by its statement that "[e]ven if this court were to conclude that this Project is a mammoth boondoggle, socially and architecturally ill-advised, it would still be a question for the political process, not a federal court." (18a-19a).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the judgment of the district court in a

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drive those activities into other areas of New York City, including the streets of adjacent areas in northern Times Square where similar activities have already taken root.

per curiam opinion dated August 26, 1985. (1a-5a). The court of appeals, like the district court, assumed the validity of the Project's public purpose and did not offer reasons for holding that petitioners' allegations failed to state a claim that their property was being taken unconstitutionally.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S DECISION, WHICH EFFECTIVELY PRECLUDES ANY JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF TAKINGS, IS INCONSISTENT WITH THIS COURT'S HOLDING IN *MIDKIFF* THAT THE COURTS HAVE A ROLE TO PLAY IN DETERMINING WHETHER A TAKING IS FOR A PUBLIC USE.

In *Hawaii Housing Authority v. Midkiff*, ___ U.S. ___, 104 S.Ct. 2321 (1984), this Court reaffirmed both the breadth of the eminent domain power and the deference that courts should pay to a legislative determination that the power should be exercised in a particular case. Of equal importance, the Court also reaffirmed in *Midkiff* that "[t]here is, of course, a role for courts to play in reviewing the legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." 104 S.Ct. at 2329.

Despite this Court's explicit reservation of some role for the court in reviewing the constitutionality of takings, a number of commentators have interpreted *Midkiff* as effectively barring any judicial review whatsoever of public use determinations. One author, expressing a view shared by others, has interred the public use clause with stunning finality, writing that *Midkiff* "suggest[s] that the public use requirement is now constitutional surplusage. After *Midkiff*, there are no effective limitations other than the requirement of just compensation." Note, *Eminent Domain—The Public Use Clause and Judicial*

Review, Ariz. St. L.J. 237, 237 (1985). *See also* Note, *The Public Use Limitation On Eminent Domain After* Hawaii Housing Authority v. Midkiff: *Does It Still Exist?*, 12 N.Ky.L. Rev. 65, 85 (1985) (*Midkiff* "pushed the public use restriction on eminent domain takings to its furthest point, if not to complete extinction"); Note, Hawaii Housing Authority v. Midkiff: *A Final Requiem For The Public Use Limitation On Eminent Domain?*, 60 Notre Dame L. Rev. 388, 404 (1985) ("To imply a power [of eminent domain] in government, to give that power the broadest possible meaning, and then to defer to the exercise of that power in the face of a specific constitutional restriction, effectively nullifies the public use limitation and disregards those individual rights which the fifth amendment was designed to protect")[5].

Like these commentators, the district court below adopted the view that *Midkiff* relegated all decisions relating to condemnation to the political arena. Referring to the "political give and take in the legislative and executive branches," (22a),

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5 The view that a public use determination is now unreviewable flows in large part from the quotation in *Midkiff* of some of the more restrictive *dicta* from earlier decisions of this Court. Those quotations, however, must be read in the context of *Midkiff*'s continuing endorsement of some remaining judicial role. For example, *Midkiff* drew heavily on *Berman v. Parker*, 348 U.S. 26 (1954). In *Berman*, the Court declared that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 32. This formulation is inconsistent with the Court's major premise that judicial review is available because one of the constitutional limitations is whether the taking is for a public use. If the legislature's declaration on that issue were truly "conclusive," the court would be confined to the role of a rubber stamp, and there would be no constitutional limit at all.

Similarly, *Midkiff* quotes with apparent approval *Berman*'s reference to *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), to the effect that "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.' " *Midkiff*, 104 S.Ct. at 2329. Surely this is an implausible standard even in an area where great deference is due. Were this literally the scope of judicial review, a court could intervene in nothing short of a declaration that the Rosenthal Building was being taken for a "public purpose" that was a physical impossibility.

the court effectively held that the judiciary has no role in monitoring abuses in the exercise of the eminent domain power:

> The short answer is that the political process will stop the worst excesses of [the New York real estate industry]. Within very broad constitutional parameters monitered [sic] by the courts, our system leaves such land use questions to the elected representatives of the people . . . . The court is confident, however, that the political process will not permit defendant Klein or anybody else to turn Central Park into condominium apartments.

(22a). The district court thus relegated petitioners to the "remedies" of the political process that had led petitioners to the courthouse in the first place.

While the court of appeals affirmed the district court in all respects, it did not state its reasons for finding petitioners' allegations legally insufficient. However, it is demonstrable that the standard it applied for judging the constitutionality of condemnation amounted to no judicial review at all, notwithstanding *Midkiff*'s reservation of such a role. As will be shown below, precedents which *Midkiff* left undisturbed suggest three legal standards for distinguishing condemnations that are constitutional from those that are not. First, a condemnation is unconstitutional if it is for a private rather than a public use. Second, a condemnation is unconstitutional if it is arbitrary or capricious. Third, a condemnation is unconstitutional if it is intended to raise revenue rather than to obtain property needed for public purposes.

By affirming the dismissal of petitioners' complaint, the court of appeals necessarily ruled that *Midkiff* had rejected all of these three standards drawn from prior cases. Unless the Court intended in *Midkiff* to foreclose all judicial review under the Takings Clause, the result reached by the court of appeals cannot be reconciled with *Midkiff*. Accordingly, certiorari should be granted to rectify this conflict and to clarify the legal standards for determining the validity of condemnations.

A. The Lower Courts' Dismissal Of Petitioners' Allegations That Their Building Is Being Taken For Private Purposes Is Inconsistent With *Midkiff*'s Reaffirmation Of The "Public Use" Requirement.

In *Midkiff*, the Court expressly reaffirmed the centuries-old rule that the Constitution "forbids even a compensated taking where executed for no reason other than to confer a private benefit on a particular private party." 104 S.Ct. at 2331.[6] It is well established that a condemnation is lawful under the constitutional "public use" standard only if the condemned property will be used *predominantly* or *principally* for a public use. Thus, while *incidental* private benefit will not invalidate a taking if it is derived from land which is put to a public use, an acquisition which is *primarily* for private benefit is not for a public use. 2A *Nichols on Eminent Domain* § 7.08 (3d ed. 1981). As one court put it, " 'the tail cannot wag the dog' and allow the public purpose to be only incidental to a predominantly private one." *Baycol, Inc. v. Development Authority*, 315 So.2d 451, 456 (Fla. 1975). Similarly, in *Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451, 99 N.E.2d 235 (1959), the court held that a taking is not for a public purpose "where the public benefit is only incidental to the private," 99 N.E.2d at 238, and ordered a trial on the issue of public use. *See also Petition of Seattle*, 96 Wash.2d 616, 638 P.2d 549 (1981) (project with primarily private benefit held not for a public purpose despite city council declaration to the contrary).

Petitioners alleged that their property was not being taken for a valid public purpose, but was instead being condemned solely or primarily for the private benefit of respondents Park Tower and Klein. Succinctly put, petitioners sought an opportunity to prove below that it is entirely unnecessary to give defendants Klein and Park Tower hundreds of millions of

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6 *Accord, Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 252 (1905); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 417 (1896).

dollars worth of incentives, or to allow them to construct million of square feet of new office space at the heart of Times Square, merely to finance a few million dollars worth of subway entrance improvements and theater renovations, and to displace street crime a few blocks farther north. In dismissing petitioners' complaint, the lower courts necessarily held that even comparatively minor public benefits are sufficient to provide the necessary constitutional basis for a taking that is overwhelmingly for the benefit and advantage of private individuals.

The Court's reaffirmation in *Midkiff* that the constitution prohibits takings for private purposes will prove an empty gesture if, as the lower courts' decisions imply, the constitutionally required public purpose for a condemnation can be found in public benefits that are trivial in relationship to the private aspects of a proposed project. As this case illustrates, it will always be expedient for a real estate developer to include a few minor public amenities in an otherwise private project in return for the opportunity to use the power of eminent domain to assemble the site for a project. The novel and restrictive interpretation of "public use" adopted by the lower courts is so easily satisfied that it effectively reads the public use requirement out of the Constitution, a result in conflict with the Court's reaffirmation of this requirement in *Midkiff*.

B. The Lower Courts' Dismissal Of Petitioners' Complaint Is Inconsistent With Federal Cases Holding That Property Cannot Be Taken Arbitrarily And Capriciously.

The principle that property may not be taken arbitrarily and capriciously is derived from this Court's decision in *United States v. Carmack*, 329 U.S. 230 (1946). Although *Carmack* itself found it unnecessary to decide the issue, other federal courts (including two circuit courts other than the Second Circuit) thereafter applied the standard that arbitrary and capricious takings are not constitutional. *United States v. 101.88 Acres of Land, Etc.*, 616 F.2d 762, 767 (5th Cir. 1980); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058 (7th

Cir. 1973); *United States v. 2.9 Acres of Land*, 554 F. Supp. 529, 532 (D. Mont. 1982); *Hilliard v. Commonwealth of Pennsylvania*, 308 F. Supp. 756, 760 (W.D. Pa. 1970); *United States v. 0.08 Acres of Land*, 246 F. Supp. 408, 410 (E.D. Tenn. 1965); *United States v. Certain Land in the Borough of Manhattan*, 233 F. Supp. 899, 901 (S.D.N.Y.), *aff'd*, 336 F.2d 1021 (2d Cir. 1964); *United States v. 1,108 Acres of Land*, 25 F.R.D. 205, 208 (E.D.N.Y. 1960)[7]

Although *Midkiff* does not specifically address the "arbitrary and capricious" standard, it points out that the Court has never proscribed a taking "where the exercise of the eminent domain power is rationally related to a conceivable public purpose." 104 S.Ct. at 2329. Requiring a rational relationship between a taking and a public use is fully consistent with the "arbitrary and capricious" standard of adjudicating takings established by the earlier federal cases.[8]

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7 *Carmack* was also discussed by Judge Learned Hand in his dissent in *United States v. State of New York*, 160 F.2d 479 (2d Cir.), *cert. denied*, 331 U.S. 832, *reh'g denied*, 331 U.S. 869 (1947), in which the State challenged the federal government's extended taking of a wartime railroad easement in a forest preserve after cessation of hostilities. Dissenting from the majority's apparent resistance to the scope of review implied by *Carmack*, Judge Hand stated:

> [I]n deciding whether a taking has been "arbitrary" more is always involved, I apprehend, than whether the United States has any interest whatever to be subserved. As in the case of substantially every right, the result depends upon a compromise between two conflicting interests; what we mean is that the disparity between the contrasted values must not be shockingly against the proposed action. . . . [A]lthough summary disposition has of course its place, it is most important that we should keep it in that place.

160 F.2d at 482 (L. Hand, J., dissenting).

8 *Midkiff* involved the constitutionality of a statute passed by a state legislature, and there was no allegation that the statute was not being applied evenhandedly by local officials. While considerable deference is appropriate when the courts are asked to consider the legitimacy of the considered judgment of a state's sovereign legislative branch, it by no means follows that the courts should turn a blind eye to the political abuses of individual local politicians. *See* Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. Rev. 409, 434 (1983).

As discussed above, petitioners' complaint alleged that the Rosenthal Building was being taken arbitrarily and capriciously because, *inter alia*, respondents had chosen not to condemn the rundown Candler Building located in the middle of the "blighted" block of 42nd Street but owned by a politically well-connected individual, while respondents were attempting to take the structurally sound, fully utilized Rosenthal Building on a non-blighted block on the Project's edge. The court of appeals gave no reason for its conclusion that these allegations failed to state a claim. In reaching this result, however, the court necessarily rejected the holding of the other federal courts cited above, left undisturbed by *Midkiff*, that takings are unconstitutional if they are arbitrary and capricious.[9]

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9 In urging the lower court to affirm the dismissal of the complaint, respondents relied heavily on *Berman v. Parker*, *supra* n.5. *Berman* held, *inter alia*, that an urban development plan need not provide for the preservation of the occasional sound building found in the midst of a slum; rather the redevelopment agency may condemn and replace *every* building within a project's boundary. Although respondents made a strenuous effort to analogize the taking of the Rosenthal Building to this holding of *Berman*, the analogy fails in three critical respects. First, there was no suggestion in *Berman* that condemnation decisions were infected by political favoritism. Second, while *Berman* may stand for the proposition that the UDC and City could have condemned *every* site within the Project's boundaries, that is not what respondents have done. Both the Candler Building and the Rosenthal Building are within the Project's boundary, yet respondents have decided to condemn one and spare the other, and nothing in *Berman* suggests that this decision can be made arbitrarily and capriciously. Indeed, as the cases cited above demonstrate, the federal courts continued to entertain challenges to arbitrary and capricious takings after *Berman* was decided in 1954. Finally, while *Berman* may permit local authorities to condemn all property *within* the area that is blighted, nothing in *Berman* authorizes those authorities to *expand* the boundaries of a Project arbitrarily to a non-blighted block, where the Rosenthal Building is located, to create a more profitable office complex for the Project's private developer.

C. The Lower Courts Erroneously Decided The Important Federal Issue Of Whether The Power Of Eminent Dor[illegible] Be Used As A Substitute For Taxation.

In our system of government, state revenues are raised through taxation, which falls uniformly on similarly situated citizens. Permitting governments to condemn selected property solely to raise money would shift the burden of financing the operations of government from the general public who pay taxes to particular individual property owners who are unfortunate enough to have their properties chosen for condemnation.

Petitioners alleged that the taking of the Rosenthal Building is an unconstitutional effort to use the powers of eminent domain as a substitute for the power of taxation. While the federal courts do not appear to have addressed the issue, its importance is reflected in the decisions of the New York courts, which recognize that the taking of private property solely for the purpose of raising revenue for the government does not constitute a valid public purpose.

In *Courtesy Sandwich Shop, Inc. v. Port of New York Authority, Inc.*, 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *app. dism'd*, 375 U.S. 78, *reh'g denied*, 375 U.S. 960 (1963), the New York Court of Appeals considered the constitutionality of a statute that allowed the Port Authority to condemn 13 square blocks to erect a "World Trade Center." The New York Appellate Division had declared the statute unconstitutional, holding that "the act granted a power to condemn property to be used for no other purpose than the raising of revenues for the expenses of the project." 12 N.Y.2d at 388, 190 N.E.2d at 404, 240 N.Y.S.2d at 4. Reversing, New York's highest court held that the statute could be saved by reading it in a way that did not allow "unfettered erection of structures that are solely revenue producing." *Id.* at 389, 190 N.E.2d at 405, 240 N.Y.S.2d at 7. Under *Courtesy Sandwich Shop*, the structure to be erected on a condemned site must be "devoted to project purposes." 12 N.Y.2d. at 390, 190 N.E.2d at 406, 240 N.Y.S.2d

at 7.[10] The Rosenthal Building is not being taken to make way for a public improvement such as a police station or park. Even if it is assumed that the income derived from the new office building to be built on this site will be used to support subway improvements and theater renovations (rather than to increase Pan Am Tower's profits), this case squarely presents the issue of whether condemnations intended to derive revenue for governmental purposes are lawful. By affirming the dismissal of petitioners' complaint, the Second Circuit necessarily refused to adopt the rule of *Courtesy Sandwich Shop* as a constitutional restraint on the taking power.

CONCLUSION

As the foregoing demonstrates, the court of appeals decision rejected as legally insufficient allegations that would have been sufficient to state a claim under *all* of the constitutional standards that had been applied by federal and state courts to adjudicate the constitutionality of takings prior to *Midkiff*. Petitioners recognize that the Court may deem it appropriate to restate or modify the standards applied in the earlier cases. However, unless the Court grants certiorari and articulates the standards that should be applied by the courts in condemnation cases, it will confirm the analysis of commentators and the courts below that potential condemnees have been relegated entirely to the remedies of the political process. If petitioners' allegations do not state a claim of unconstitutional taking in this case, it is difficult, if not impossible, to understand how any future condemnee will be able to fashion a complaint that will withstand a motion to dismiss. While the court of appeals may not have said so expressly, its decision must necessarily

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10 While the *incidental* generation of government revenue by the new structure will not invalidate an otherwise lawful taking under *Courtesy Sandwich Shop*, condemnation *solely* or *principally* for the purpose of creating revenue for governmental purposes is unconstitutional.

have resulted from its view that *Midkiff* was intended to foreclose all judicial review of condemnation decisions.

It would be extraordinary if, as the law reviews and the lower courts suggest, this Court intended no judicial review of so vast a governmental power over individuals as the power to condemn private property. The power to take property is unique since, unlike other local governmental decisions, the burden of condemnation falls disproportionately on the few individuals whose property is taken. It is precisely because the "political process" tends to favor well-connected insiders at the expense of the individual that the courts are required to ensure that governmental action is rational, taken in good faith, and free of arbitrariness. This has always been a tenet of American government:

> By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority . . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The Federalist No. 78, at 466 (A. Hamilton) (The New American Library ed. 1961).

For all of the foregoing reasons, certiorari should be granted to permit this Court to clarify what judicial role it envisioned in *Midkiff* and to define the standards by which the lower courts are to review a determination of public use.

Respectfully submitted,

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Dated: January 3, 1986

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 1103—August Term, 1984

(Argued May 22, 1985 Decided August 26, 1985)

Docket No. 85-7104

ROSENTHAL & ROSENTHAL INC. and
BROADWAY 41ST STREET REALTY CORPORATION,
Plaintiffs-Appellants,

—v.—

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION and GEORGE E. KLEIN,

Defendants-Appellees,

and

MARIO M. CUOMO, as Governor of the State of New York,
Defendant.

Before:

MANSFIELD, VAN GRAAFEILAND and PIERCE,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Motley, C.J.) dismissing complaint seeking to enjoin condemnation proceedings which are part of the Forty-Second Street Development Project.

Affirmed.

NORMAN DORSEN, New York, N.Y. (LeBoeuf, Lamb, Leiby & MacRae, Jacob Friedlander, John S. Kinzey and Gwenellen P. Janov, N.Y., N.Y., of Counsel) *for Plaintiffs-Appellants.*

PETER JAMES JOHNSON, New York, N.Y. (Leahey & Johnson, P.C., Michael Conforti and Kevin B. Lynch, N.Y., N.Y., of Counsel), *for Defendants-Appellees Urban Development Corporation, Times Square Redevelopment Corporation and William J. Stern.*

DEAN G. YUZEK, New York, N.Y. (Shea & Gould, Bernard D. Fischman and Judith L. Spanier, N.Y., N.Y., of Counsel), *for Defendants-Appellees Park Tower Realty Corporation and George Klein.*

GARY SCHULLER, New York, N.Y. (Frederick A.O. Schwarz, Jr., Corporation Counsel, Joseph I. Lauer and Robert J. Pfeffer, N.Y., N.Y., of Counsel), *for Defendants-Appellees City of New York and Edward I. Koch.*

Rosenthal & Rosenthal Inc. and Broadway 41st Street Realty Corporation appeal from a judgment of the United States District Court for the Southern District of New York (Motley, C.J.) dismissing their complaint against appellees, New York State Urban Development Corporation, *et al.*, for failure to state a claim upon which relief may be granted. Appellants, lessee and owner of the Rosenthal Building located on West Forty-First Street between Broadway and Seventh Avenue, brought the instant action to enjoin appellees from commencing condemnation proceedings against their property and from otherwise seeking to take the property involuntarily. Because the proposed taking is rationally related to a conceivable public purpose, we affirm the judgment of dismissal.

This case represents the most recent chapter in the saga of the Forty-Second Street Development Project. The Project, a tripartite undertaking by the City of New York, the New York State Urban Development Corporation (UDC) and various private developers, is the product of a lengthy, statutorily mandated, land use review procedure which included extensive public hearings and resulted in hundreds of pages of detailed findings. Its primary goal is the elimination of the physical, social and economic blight that has afflicted the Times Square area of Manhattan for the past fifty years. *See Natural Resources Defense Council, Inc. v. City of New York*, 672 F.2d 292, 294 (2d Cir.), *cert. dismissed*, 102 S. Ct. 1963 (1982).

As part of the Project, the UDC has designated appellee, Park Tower Realty Corporation, as the developer of four new office towers, ranging in height from twenty-nine to fifty-six stories. If the Project proceeds as planned, the Rosenthal Building will be condemned and razed to make way for one of these new office buildings. Because appellants' building is structurally sound, fully utilized and is not blighted or substandard, they allege that its condemnation will be "neither for a public purpose, nor rationally related to a public purpose" but, instead, will be "completely arbitrary and capricious".

In an opinion dated January 8, 1985, the district court ordered the dismissal of appellants' complaint for failure to

state a claim upon which relief might be granted. The court found that the Project "addresses legitimate public purposes in a reasonable way, and the inclusion of the Rosenthal building, less than a block from the core area of blight, is certainly not irrational". Relying upon *Berman v. Parker*, 348 U.S. 26 (1954), and upon the Supreme Court's recent reaffirmation of *Berman* in *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984), the district court held that so long as there was a legitimate public purpose underlying the Project and so long as the proposed condemnation was rationally related to that purpose, the taking of the Rosenthal building met constitutional requirements. We agree.

The power of eminent domain is a fundamental and necessary attribute of sovereignty, superior to all private property rights. *Georgia v. City of Chattanooga, Tennessee*, 264 U.S. 472, 480 (1924); *Albert Hanson Lumber Company v. United States*, 261 U.S. 581, 587 (1923). This power, however, is circumscribed by the "public use" requirement of the Fifth and Fourteenth Amendments to the United States Constitution. *Hawaii Housing Authority v. Midkiff*, *supra*, 104 S. Ct. at 2328-30. Under the public use clause, "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937). "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose", *Hawaii Housing Authority v. Midkiff*, *supra*, 104 S. Ct. at 2329, courts long have recognized that the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution. *Id.* at 2329-30.

No serious argument can be made that the Forty-Second Street Development Project does not address legitimate public purposes in a reasonable manner. This Court already has taken note of the area's blighted condition. *See Natural Resources Defense Council, Inc. v. City of New York*, *supra*, 672 F.2d at 294, in which we referred to the "under-utilization of property

in the area, high vacancy rates above the ground floor, the proliferation of pornographic uses, dilapidated store fronts, the number of lots in tax arrears, dirty and unsafe street conditions, and a high crime rate which requires increased allocation of police service to the area." Indeed, appellants do not seek to enjoin the Project in its entirety, but only as it affects their building.

However, the condemnation of appellants' building to make way for the redevelopment of the blighted area is a classic example of a taking for a public use or purpose within the law of eminent domain. It makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end. *Hawaii Housing Authority v. Midkiff*, *supra*, 104 S. Ct. at 2331. Nor does it matter that the Rosenthal Building is structurally sound and fully utilized because "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." *Berman v. Parker*, *supra*, 348 U.S. at 35. As the Supreme Court has made clear, "[w]hen the legislature's purpose is legitimate and its means are not irrational, . . . empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Hawaii Housing Authority v. Midkiff*, *supra*, 104 S. Ct. at 2330.

The judgment of the district court is affirmed.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 85-7104

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of August one thousand nine hundred and eighty-five.

Present:

HON. WALTER R. MANSFIELD,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,

Circuit Judges.

ROSENTHAL & ROSENTHAL INC. and
BROADWAY 41ST STREET REALTY CORPORATION,

Plaintiffs-Appellants,

—v.—

THE NEW YORK STATE URBAN DEVELOPMENT CORPPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION and GEORGE E. KLEIN,

Defendants-Appellees,

and

MARIO M. CUOMO, as Governor of the State of New York,

Defendant.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the JUDGMENT of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

ELAINE B. GOLDSMITH
Clerk

By: Edward J. Guardaro
Deputy Clerk

A TRUE COPY
Elaine B. Goldsmith
/s/ _____
Clerk

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 85-7104

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of October one thousand nine hundred and eighty-five.

ROSENTHAL & ROSENTHAL INC. and
BROADWAY 41ST STREET REALTY CORPORATION,
Plaintiffs-Appellants,

—v.—

THE NEW YORK STATE URBAN DEVELOPMENT CORPPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION and GEORGE E. KLEIN,

Defendants-Appellees,

and

MARIO M. CUOMO, as Governor of the State of New York,
Defendant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiff-Appellants

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Appendix D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

84 Civ. 7229 (CBM)

ROSENTHAL & ROSENTHAL INC. and
BROADWAY 41ST STREET REALTY CORPORATION,
Plaintiffs,

—against—

THE NEW YORK URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; MARIO M. CUOMO as Governor of the State of New York; THE CITY OF NEW YORK; EDWARD I. KOCH as Mayor of the City of New York; PARK TOWER REALTY CORPORATION; and GEORGE E. KLEIN,
Defendants.

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Attorneys for Defendants Park Tower and Klein

MOTLEY, *Ch. J.*

OPINION

Plaintiffs, owner and lessee of an office building located on the corner of 41st Street and Broadway in Manhattan, sue to enjoin condemnation of their building to make way for the proposed Forty-Second Street Development Project. Plaintiffs allege that the proposed taking of their building is neither for nor rationally related to a public purpose, and therefore amounts to an unconstitutional taking in violation of the fifth and fourteenth amendments. Plaintiffs bring their claim pursuant to 28 U.S.C. section 1983. All defendants have moved to dismiss on essentially three different theories: 1) failure to state a claim on which relief may be granted, 2) the doctrines of ripeness, abstention, and comity, and 3) improper joinder of parties. The court halted all discovery in this action pending resolution of the motions to dismiss, and ordered that these motions be addressed solely to the face the complaint. Therefore, since plaintiffs have had no opportunity to develop the factual basis of their complaint, the court has taken no notice of the factual affidavits submitted by defendants in support of these motions. For the reasons set forth below, however, defendants' motion to dismiss is granted.

FACTS:

This case is one of several to arise out of the large scale joint effort by the City and State to redevelop the Times Square area. For purposes of these motions, the factual background contained in the complaint will suffice.

On or about June 27, 1980, defendants Urban Development Corporation (UDC) and the City entered into a Memorandum of Understanding providing that the City and UDC would jointly prepare a plan and designate a developer to redevelop the Times Square vicinity, and that the UDC would have responsibility for implementation of the plan. In November, 1982, the UDC formed the Times Square Redevelopment

Corporation (TSRC) as its subsidiary with primary responsibility for the development of Times Square.

Pursuant to the Memorandum of Understanding, the City and the TSRC have formulated the Forty-Second Street Development Project. The UDC has stated that the goals of the Project are "to eliminate blight on 42nd Street between Broadway and Eighth Avenue, to revitalize this vital crossroad and integrate it into the theatrical, cultural and commercial life of the city." Complaint paragraph 16.

The Project consists of several elements: Renovation of nine theatres on 42nd Street, subway station improvements, a new hotel, a large wholesale merchandise mart, and four new office towers ranging from 29 to 56 stories in height. One of the four towers, planned for the southern edge of the Project area, would be built partially on the site now occupied by the Rosenthal building. The site for the office towers will be assembled by the UDC through the use of the power of eminent domain. The actual construction of the buildings, however, will be undertaken by the designated private developer, defendant Park Tower Realty, of which defendant Klein is a principal. The buildings will be leased to Park Tower on a long-term basis and operated by Park Tower as private office buildings. In return, Park Tower will make contributions towards the subway and theater improvements.

Since the filing of the complaint in October, the City's Board of Estimate has approved the project and the UDC has published its findings in connection with the proposed condemnation, which could commence this spring. However, the condemnation may be delayed by the pendency of state and federal proceedings challenging the project.

Plaintiffs have owned and done business in their building for approximately 25 years. For the purposes of these motions, the court accepts as true plaintiffs' assertions that the building is structurally sound, attractively maintained, fully occupied, and in no way blighted. Plaintiffs maintain that since they do not contribute to the spread of blight, the condemnation of their building is not rationally related to the UDC's stated goal of

combatting blight. Plaintiffs urge that the taking of their building therefore be declared unconstitutional on two different grounds: First, that the building is being condemned solely to make money for defendant Klein, which is alleged to be a constitutionally illegitimate private purpose, and second, that the use of condemnation to raise funds for subway and theater renovations is an unconstitutional substitution for taxation.

Defendants urge this court to abstain from reaching the merits of plaintiffs' claims on the basis that the controversy is not yet ripe, and under the doctrines of abstention and comity. Defendants suggest that proceedings challenging the Project's blight findings under section 207 of the State's Eminent Domain Procedure Law should be allowed to proceed prior to any federal court intervention. In addition, all defendants except the UDC, the TSRC, and Stern argue that they are improperly joined since they either lack the power of condemnation or will not exercise it in this case; the injunctive relief sought therefore cannot be had against them. Finally, all defendants urge that the complaint be dismissed on its face under the well established doctrine that the courts will not second-guess the contours of a public redevelopment plan so long as a legitimate public purpose for the plan exists.

Plaintiffs argue in turn that the imminence of state condemnation proceedings makes this case ripe for decision, that the availability of a state forum does not require the federal court to abstain from reaching a claim pursuant to section 1983, and that in any event the available state forum is inadequate. Plaintiffs further argue that the close cooperation between all defendants in formulating and executing the Project makes appropriate their joinder as defendants here. Finally, plaintiffs urge that notwithstanding the long line of cases requiring judicial deference to state redevelopment plans, this case nevertheless requires the court to intervene to prevent a taking entirely for private gain, which has never been approved in prior cases.

DISCUSSION:

Defendants' procedural arguments can be disposed of summarily. Any doubt that objections to the condemnation of property for the Project presented a ripe controversy at the time of the filing of this complaint have been dispelled by the Project's approval by the Board of Estimate and the publication of the UDC's findings. Condemnation is imminent and so is plaintiffs' alleged loss. Moreover, assuming that plaintiffs have pleaded a substantial constitutional cause of action, this court sees no need to abstain in deference to possible state proceedings filed after the commencement of this action.

The argument of some defendants that they are not proper parties to this action gives the court more pause. However, while the relief sought here technically is only injunction of the condemnation of plaintiffs' building, this court believes that the concerted activity of all defendants in bringing about this project justifies their joinder here. *See Archer Gardens, Ltd. v. Brooklyn Center Dev. Corp.*, 468 F. Supp. 609, 613 (S.D.N.Y. 1979) (private developer acting in concert with state officials is proper party to section 1983 action challenging alleged taking). If plaintiffs state a valid cause of action, it may be possible for them to show that all defendants acted under color of state law to deprive them of their rights. If there is no valid cause of action, then the question is moot. The court proceeds, therefore, to the question of whether the complaint in this case states a claim upon which relief may be granted.

Defendants rely largely on the landmark case of *Berman v. Parker*, 348 U.S. 26 (1953), in which the Supreme Court established the now-familiar principle that courts will not second-guess the decisions of local government in land use and redevelopment. *Berman* held that the elimination of blight is a legitimate governmental goal and that condemnation and redevelopment are within the police powers of the state in attaining that goal. *Id.* at 33-34. The Court rejected a property owner's claim that the taking was improper because his property was not blighted and because the property in question would be put into private hands. Since the government had legitimately

found the area blighted, the Court would not sit in judgment over the boundary lines of the project. *Id.* at 35-36.

So well settled is the principle of deference to land use decisions that at least one federal court has heid that it lacked even subject matter jurisdiction over an attempt to challenge a local sewage plan in the setting of a civil rights action. "Section 1983 was never intended as a vehicle for federal supervision of land use policy." *City of Oak Creek v. Milwaukee Metropolitan Sewage District*, 576 F. Supp. 482, 487 (E.D. Wis. 1983). Such a claim must be dismissed absent "compelling evidence of a genuine civil rights violation." *Id.*

The Supreme Court most recently reaffirmed the central themes of *Berman* in *Hawaii Housing Authority v. Midkiff*, 81 L. Ed. 2d 186 (1984). In *Midkiff*, the Court upheld a state land reform procedure aimed at breaking up large land holdings in Hawaii, rejecting a claim that it amounted to an unconstitutional taking. The Court concluded that since the purpose of eliminating oligarchical control of land was a legitimate one, Hawaii could use a condemnation-like proceeding to put land ownership into more diverse hands.

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public.

Id. at 199.

These fixed principles narrow our inquiry. Recognizing this, plaintiffs maintain that this case involves a purely private taking with no public purpose whatsoever, which the *Midkiff* court held would be unconstitutional and void. *Id.* at 200. Plaintiffs argue strenuously that there is a serious factual dispute as to the true nature of this project, and that their version requires us to distinguish this case from *Midkiff* and *Berman*.

Plaintiffs assert that the Forty-Second Street Project is a very different kind of project from that which has been

approved before. The Project, they argue, is not a wholesale clearing of blighted areas and does not involve the upgrading of housing as in *Berman*, but is merely an attempt to use redevelopment to eliminate the *social* blight of drugs and crime in Times Square. Here, plaintiffs argue, since defendants have chosen not to level the whole neighborhood but selectively to demolish, restore, or leave alone each building within the project area, the decision of which buildings are to be demolished must not be arbitrary and capricious if the Project is to withstand the rational relationship test. This is not a case where a private landowner seeks to protect a small pocket of non-blight and holds up development of a blighted area. Rather, plaintiffs argue, the project is being enlarged to take in desirable, non-blighted property for the sole purpose of generating additional profit for Klein.

Plaintiffs assert that the Candler and Hotel Carter buildings, in much worse condition and more centrally located in the project area, will be left untouched for illegitimate reasons—the Candler building because its owner is said to be well-connected politically, and the Hotel Carter because the government allegedly seeks to avoid paying relocation costs to the welfare families who live there.

Plaintiffs also point out that a "white paper" prepared by the law firm of Cadwalader, Wickersham, and Taft for Milstein Properties, a rival developer, raises serious questions of improper political influence in the selection of Klein as developer. Plaintiffs allege that when Milstein was about to be chosen as developer of the merchandise mart that will be built as part of the Project, the City threatened to back out of the Project unless Klein, who is a supporter of Mayor Koch, were given half the job. Park Tower, plaintiffs assert, will earn about $650 million on the Project, while contributing only about five percent of that for subway and theater improvements.

All of the foregoing, say plaintiffs, establishes that this is primarily a private real estate development for Klein's profit, replacing one non-blighted office building with another, with

marginal public benefit. To the extent that the developer contributes money for public amenities, plaintiffs argue that this is an improper use of eminent domain to raise money in lieu of taxation. Even if legitimate, the comparatively modest amount of money involved could be raised from two large office towers, instead of the four planned. The only reason for the additional two buildings, which necessitate the taking of plaintiffs' property, is to make more money for Klein. Plaintiffs insist that the complaint therefore states a cause of action under *Midkiff*, because this allegedly private taking is not rationally related to a public purpose.

In sum, plaintiffs argue that *Midkiff* and *Berman* provide for a narrow role for courts which is appropriate to exercise here: when a taking is planned solely for a private purpose, it must be held unconstitutional. If the taking of the Rosenthal building is permitted, they argue, New York real estate will be fundamentally changed, because politically connected developers will be able to assemble sites for development with the aid of eminent domain, freely condemning desirable property adjacent to arguably blighted areas.

Plaintiffs are correct that *Midkiff* provides a narrow role for this court—a very narrow role indeed. Absent evidence that a proposed taking treads on a specific constitutional right, we are concerned only that a taking is rationally related to some legitimate public purpose. It is clear from the foregoing recitation that many of plaintiffs' assertions are far too broad to address this limited concern, and are clearly precluded by the settled law of *Berman* and *Midkiff*. It is too late in the day to assert that it makes any difference that this Project does not involve housing, that it will give property to private developers, that those developers will make a profit, that the boundary lines could have been drawn differently, that plaintiffs' property is not blighted, or even that the Project is poorly designed to serve its goals. These matters are, for better or worse, squarely within the discretion of the political branches. Even if this court were to conclude that this Project is a mammoth boondoggle, socially and architecturally ill-advised,

it would still be a question for the political process, not a federal court.

But plaintiffs here allege more: They allege that fighting blight is *not*, as a matter of fact, the motivation behind this Project. They assert that the actual *reason* for the project is to make money, specifically for a developer who is alleged to be a close supporter of the Mayor and other politicians. In other words, without disputing that the state basically may do what it likes so long as it intends to fight blight and might reasonably believe that this project would further the goal, plaintiffs assert that defendants here did *not* so believe or so intend. They were motivated instead simply by the desire to make money for Klein.

Defendants conceded at oral argument that if plaintiffs' allegations, in this extreme form, were literally true, then the complaint would state a cause of action. Defendants maintain, however, that the suggestion that no public purpose of any kind exists for the Forty-Second Street Project must be rejected on the face of the complaint. This court agrees. The complaint itself refers to the broad public purposes behind this Project: To eradicate blight in Times Square and to revitalize the area culturally and commercially. Defendants argue that this court can take judicial notice of the violent crime, drug traffic, and physical deterioration of the Times Square area, and plaintiffs do not appear to dispute the point. In fact, plaintiffs do not even *plead* that the Project lacks a public purpose. Instead, they limit their allegations to the purpose underlying the taking of the Rosenthal building. *See* Complaint paragraphs 21-23.

It is clear, then, that a substantial, legitimate public purpose underlies the Project, and that a large scale redevelopment plan such as is described in the complaint is rationally related to serving that purpose. Plaintiffs would have us avoid this conclusion by permitting them to prove that the "true" motivation behind the project is private profit. Such an argument flies in the face of reality, even as portrayed in plaintiffs' own pleading. It is not enough that the Project planners were

partially motivated by the desire to make money for private developers. Such mixed motivations seem politically inevitable and perhaps are necessary to the success of this kind of project. To constitute a purely private taking and thus fit within the narrow exception of *Midkiff*, plaintiffs must demonstrate that *no* public purpose exists for the Project. This they cannot do.

To the extent that plaintiffs can prove favoritism in the selection of one developer over another, there may be a violation of state law necessitating a new selection, but this does not go to plaintiffs' constitutional claim. In order to state a constitutional cause of action, plaintiffs would have to charge a level of corruption beyond that pleaded or reasonably inferred from the pleading here. Plaintiffs would have to be able to plead that the public purposes put forth for the plan were a sham and a fraud on the public, and that the project *existed* to profit defendant Klein—not merely that it was shaped in such a way as to make it more profitable for him. Since this would amount to a serious allegation of public fraud, it would have to be pleaded with specificity. Despite the complaint's conclusory allegation that the taking of the Rosenthal building is solely for Klein's benefit, the court does not understand the plaintiffs to allege that this kind of fraud is taking place. Once a legitimate public purpose for the overall project is conceded, however, the court cannot get involved in parsing the particular degree of public or private motivation behind the inclusion of a particular site in the Project area, so long as that inclusion could rationally be related to the public purpose of the plan as a whole.

Plaintiffs also argue that since *Midkiff* approved Hawaii's plan aimed at breaking up oligarchical land holdings, New York may not now use this Project to *concentrate* land ownership in the Times Square area in fewer hands. This argument, too, must be rejected. *Midkiff* does not represent Supreme Court endorsement of diversified rather than centralized land ownership. Rather, the case stands for the more general proposition that states have broad discretion to define public pur-

poses and to formulate plans within the police power to address them. Nothing in the Constitution prevents a state from deciding that in a particular area diversity of land ownership stands in the way of full economic development, and that assembling a major site to be developed as a piece is the best way to serve the public purposes of eliminating blight, creating jobs, and broadening the tax base.

In evaluating plaintiffs' argument that the raising of money for subway and theater renovation though the condemnation of the Rosenthal building is a constitutionally illegitimate substitute for taxation, the court must again look at the overall goals of the project. It would be simplistic to view this fundraising mechanism in a vacuum, apart from the total development plan. Plaintiffs cite *Courtesy Sandwich Shop v. Port of New York Authority*, 12 N.Y.2d 379, 388, 240 N.Y.S.2d 1, 5 (1963) for the proposition that a condemnation solely undertaken to produce revenue, with no other primary purpose, would be unconstitutional. In that case, however, the New York Court of Appeals found acceptable the use of portions of the World Trade Center development to produce incidental revenue for other parts of the port development project. Such incidental fundraising "does not vitiate the public purpose of the development as a whole." *Id.* at 390, 240 N.Y.S.2d at 7.

Similarly, it is perfectly legitimate that portions of the Forty-Second Street Project will help generate funds to support other aspects of the Project. The court rejects the suggestion that since these office towers replace other office buildings their only possible purpose is to raise a few million dollars for subway and theater improvements. These buildings are a major part of the overall redevelopment scheme, and it would be quite reasonable for the project planners to conclude that this kind of large scale redevelopment, bringing thousands of new people into the neighborhood and radically changing the physical configuration of the area, would further the Project's overall goals of eliminating blight and revitalizing Times Square.

Plaintiffs insist that if this taking is permitted the worst excesses of the New York real estate industry will flourish unchecked, with choice properties plucked at random from their rightful owners through eminent domain and turned over to politically-connected developers. If the Forty-Second Street Project is permitted to reach down to Forty-First Street to encompass a non-blighted office building, ask plaintiffs, what is to stop the state from condemning Herald Square or Gramercy Park for redevelopment, with the profits to support subway improvements and theater renovations?

The short answer is that the political process will stop it. Within very broad constitutional parameters monitered by the courts, our system leaves such land use questions to the elected representatives of the people. It is through political give and take in the legislative and executive branches that some areas are landmarked, others designated for redevelopment, still others left to the free market. This process does not always result in plans that are wise, tasteful, or even fair. The court is confident, however, that the political process will not permit defendant Klein or anybody else to turn Central Park into condominium apartments.

The federal courts remain available for challenges to truly private or truly irrational takings, as the Supreme Court acknowledged in *Midkiff*. We do not face such a situation here, and need not dwell on hypotheticals. The Forty-Second Street Project has emerged from the political process as a comprehensive attempt to address the implacable problems of crime and decay in Times Square. It addresses legitimate public purposes in a reasonable way, and the inclusion of the Rosenthal building, less than a block from the core area of blight, is certainly not irrational. Absent a particularized pleading of public fraud, or evidence of some other specific constitutional violation, that is enough to pass the scrutiny of this court.

For the foregoing reasons, the court holds that plaintiffs fail to state a cause of action on which relief may be granted. Defendants' motion to dismiss is granted.

CONSTANCE BAKER MOTLEY
Chief Judge

Dated: New York, New York
January 8, 1985

Appendix E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

84 Civ. 7229 (CBM)

ROSENTHAL & ROSENTHAL, INC., ET ANO,
Plaintiffs,

—against—

THE NEW YORK STATE URBAN DEVELOPMENT CORP., ET AL,
Defendants.

JUDGMENT

Defendant(s) having moved for an order dismissing the complaint, and the said motion having come before the Honorable CONSTANCE BAKER MOTLEY, *Chief Judge*, U.S.D.J., and the Court thereafter on January 8, 1985, having handed down its

OPINION (#57080) granting defendants' motion to dismiss; and the Court having further handed down an order discontinuing this action, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

/s/ (Illegible)
Clerk

DATED: New York, N.Y.
January 11, 1985

Appendix F

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROSENTHAL & ROSENTHAL INC., and
BROADWAY 41ST STREET REALTY CORPORATION,
Plaintiffs,

—against—

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; MARIO M. CUOMO, as Governor of the State of New York; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION and GEORGE E. KLEIN,
Defendants.

COMPLAINT

Plaintiffs, by their undersigned attorneys, complain and allege as follows:

JURISDICTION

1. This is a civil action to enjoin defendants from taking plaintiffs' property for the sole benefit of private parties, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs' claims for relief arise under the Constitution and 42 U.S.C. § 1983, and the Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331(a) and 28 U.S.C. § 1343(3) and (4).

PARTIES

2. Plaintiff ROSENTHAL & ROSENTHAL INC. ("Rosenthal") is a corporation organized and existing under the laws of the State of New York which maintains its principal place of business at 1451 Broadway, New York, New York 10036.

3. Plaintiff BROADWAY 41ST STREET REALTY CORPORATION is a corporation organized and existing under the laws of the State of New York with its principal place of business located at 1451 Broadway, New York, New York 10036.

4. Defendant NEW YORK STATE URBAN DEVELOPMENT CORPORATION ("UDC") is a corporate agency of the State of New York established by the New York State Urban Development Corporation Act, Title 16, McKinney's Unconsolidated Laws, Section 6251, *et seq.* Pursuant to Section 6263 of the Unconsolidated Laws, the UDC is authorized to acquire real property through the exercise of the State's power of eminent domain. The UDC maintains its principal place of business at 1515 Broadway, New York, New York 10036.

5. Defendant TIMES SQUARE REDEVELOPMENT CORPORATION ("TSRC") is a subsidiary of defendant UDC created pursuant to Section 6262 of the Unconsolidated Laws, which maintains its principal place of business at 1515 Broadway, New York, New York 10036.

6. Defendant WILLIAM J. STERN is the Chairman and President of both the UDC and TSRC, and is made a defendant in those official capacities. Defendant Stern authorized, approved and participated in the actions of the UDC and TSRC of which plaintiffs complain herein.

7. Defendant MARIO M. CUOMO is Governor of the State of New York and is made a defendant in that official capacity. Defendant Cuomo authorized, approved and participated in the actions of UDC and TSRC of which plaintiffs complain herein.

8. Defendant CITY OF NEW YORK (the "City") is a corporate municipality of the State of New York.

9. Defendant EDWARD I. KOCH is the Mayor of the City of New York, and is made a defendant in that official capacity. Defendant Koch authorized, approved and participated in the actions of the City of which plaintiffs complain herein.

10. Defendant PARK TOWER REALTY CORPORATION ("Park Tower") is a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 499 Park Avenue, New York, New York 10022. Park Tower is *not* a corporate agency of New York State, as are the UDC and TSRC, but rather is a private business enterprise operated solely for the benefit and profit of its stockholders.

11. Defendant GEORGE E. KLEIN is the president, chief executive officer, and principal stockholder of defendant Park Tower. Defendant Klein authorized, approved and participated in the actions of Park Tower of which plaintiffs complain herein.

CLAIMS FOR RELIEF

12. Plaintiff Rosenthal is a financial institution engaged in factoring and commercial asset-based finance. It employs over 200 people and its volume of business is approximately one billion dollars annually.

13. For over twenty-five years, Rosenthal has maintained its headquarters in a building (the "Rosenthal Building") located at the northwest corner of Broadway and 41st Street in New York City. Rosenthal leases this building from plaintiff Broadway 41st Street Realty Corporation, which is a company beneficially owned by members of the Rosenthal family. The Rosenthal Building is a seven story limestone building which was constructed in or around 1930 for the First National City Bank, the predecessor of Citibank, N.A. The Rosenthal Building is structurally sound, fully utilized, attractively furnished and decorated, and is not "blighted" or substandard in any respect.

14. On or about June 27, 1980, the UDC and the City entered into a Memorandum of Understanding which provided, *inter alia*, that the UDC and the City would jointly prepare a "Development Program" for the vicinity of 42nd Street and Seventh and Eighth Avenues in New York City, that the Mayor of the City and the UDC would jointly designate one or more developers to carry out the Development Program, and that UDC would have responsibility for the implementation of the Development Program.

15. In or about November, 1982, the UDC formed TSRC as its subsidiary and delegated to it primary responsibility for implementing the Development Program.

16. Pursuant to the Memorandum of Understanding, the UDC, the City and TSRC have formulated a program designated as the "Forty-Second Street Development Project." The UDC has stated that the goals of this Project are "to eliminate blight on 42nd Street between Broadway and Eighth Avenue, to revitalize this vital crossroad and integrate it into the theatrical, cultural and commercial life of the city."

17. The Forty-Second Street Development Project consists of the following proposed elements:

(a) The renovation of nine theater buildings on 42nd Street;

(b) The improvement and modernization of the Times Square subway stations;

(c) The construction of a large hotel on 42nd Street near Eighth Avenue;

(d) The construction of a merchandise mart on the East side of Eighth Avenue between 40th and 42nd Streets; and

(e) The construction of four new office towers, ranging from 29 to 56 stories in height, at the southern end of Times Square.

18. If the current version of the Forty-Second Street Development Project is implemented, one of the four proposed office towers described in Paragraph 17(e) above will be built on the site now occupied by the Rosenthal Building. Unless it is restrained from doing so, the UDC plans to condemn the Rosenthal Building using its power of eminent domain, and to demolish the Rosenthal Building to make way for the proposed new office building.

19. The UDC intends to take the Rosenthal Building by eminent domain notwithstanding that the Rosenthal Building is not located within the area of 42nd Street between Eighth Avenue and Broadway which the defendants claim to be "blighted," and notwithstanding that the Rosenthal Building is not, and has not been found by the defendants to be, "blighted," structurally unsound, underutilized, or deficient in any respect.

20. The planned taking of the Rosenthal Building is neither for a public purpose, nor rationally related to a public purpose, as required by the Fifth and Fourteenth Amendments to the Constitution of the United States.

21. If the proposed Forty-Second Street Development Project is implemented, the present site of the Rosenthal Building will not be used for any public purpose, but rather that site will be used exclusively for the private benefit of defendant Park Tower.

22. Park Tower has been designated by the UDC, TSRC, and the City as the developer to construct the four proposed office towers included in the Project. Although the UDC will exercise its power of eminent domain to acquire the Rosenthal Building as a site for Park Tower to develop, all of the investment money necessary to compensate plaintiffs for the taking of their building, to demolish the Rosenthal Building, and to erect a new office building in its place will be provided by Park Tower. Part Tower will manage and operate the new building as a private commercial enterprise, selecting all ten-

ants, collecting all rents, and paying all operating expenses. The new office building will not be constructed for, or predominantly occupied by, any public agency or authority, and no public benefit will be achieved by the demolition of the Rosenthal Building or its replacement by the proposed new building.

23. The proposed taking of the Rosenthal Building is not "rationally related" to a public purpose, as required by the Fifth and Fourteenth Amendments to the Constitution.

24. To induce the UDC to exercise its power of eminent domain for its private benefit, Park Tower has agreed to contribute moneys to the City, UDC, and/or TSRC to be used for the renovation of theater buildings and the improvement and modernization of subway stations and other mass transportation facilities within the area of 42nd Street that the City, UDC and TSRC claim to be "blighted." In condemning the Rosenthal Building to obtain these moneys from Park Tower, the defendants plan to use the power of eminent domain solely as a means of raising revenues, as a substitution for taxation, which is not a constitutional use of that power. Aside from producing this revenue for the City, UDC and TSRC, the proposed taking of the Rosenthal Building is completely unrelated to the defendants' stated goal of eliminating blight on 42nd Street, and the demolition and replacement of the Rosenthal Building is not necessary in any respect to achieve that goal.

25. The decision by the City, UDC, and TSRC to select the Rosenthal Building as a site which would be taken for private development to finance the Forty-Second Street Developement Project is also contrary to the Fifth and Fourteenth Amendments to the Constitution because that decision is completely arbitrary and capricious. Defendants do not propose to demolish or replace a large office building, the Candler Building, which is located on 42nd Street between Broadway and Eighth Avenue, in the midst of the area defendants claim to be blighted, and which, unlike the Rosenthal Building, is neither

structurally sound nor fully utilized. Further, defendants have excluded from the proposed Project other buildings in the Times Square vicinity which are affected by blight, underutilized, and structurally unsound, and which are therefore more appropriate buildings for inclusion in the Project than the Rosenthal Building.

26. On October 4, 1984, the UDC, through its directors, adopted a resolution which purports to make the findings that the New York Eminent Domain Procedure Law ("EDPL") requires the UDC to make before it exercises its eminent domain power to acquire the Rosenthal Building and other real property to be included in the proposed Forty-Second Street Development Project. Although the UDC has undertaken in the Memorandum of Understanding to seek the approval of the City's Board of Estimate of the proposed Project before beginning condemnation proceedings, the UDC contends that all of the statutory prerequisites of the EDPL have been satisfied and the UDC, unless restrained by this Court, will be free to begin condemnation proceedings against the Rosenthal Building immediately after the Board of Estimate gives its approval, which is expected to occur on or about October 25, 1984.

27. Plaintiffs do not seek to enjoin the Forty-Second Street Development Project in its entirety or any portion of that Project that does not involve the taking of the Rosenthal Building. However, the defendants' inclusion of the Rosenthal Building within that Project, and the proposed taking of plaintiffs' unblighted, structurally sound building by defendants, solely to benefit a private party, Park Tower, and to produce revenues that the UDC, TSRC and City will use for other purposes, denies plaintiffs due process and equal protection of the law, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

28. By virtue of the foregoing, the defendants, under color of state law, have also deprived plaintiffs of rights, privileges,

and immunities secured by the Constitution and laws of the United States, in violation of 42 U.S.C. § 1983.

29. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray that the Court enter judgment:

A. Enjoining defendants from commencing condemnation proceedings against plaintiffs' property and from otherwise seeking to take plaintiffs' property involuntarily in connection with the proposed Forty-Second Street Development Project;

B. Awarding plaintiffs the costs and disbursements of this action, including their reasonable attorneys' fees; and

C. Granting plaintiffs such other or further relief as the Court deems just and proper.

Dated: New York, New York
October 9, 1984

LEBOEUF, LAMB, LEIBY
& MACRAE

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Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1132

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ROSENTHAL & ROSENTHAL, INC. and
BROADWAY 41ST STREET REALTY CORPORATION,

Petitioners,

-v-

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION; and GEORGE E. KLEIN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether this Court ought to review a challenge to the constitutionality of the condemnation of one particular parcel within the 42nd Street Development Project when Petitioners have not contested the public purpose of the Project and the condemning authority and every federal and state court that has addressed the issue of the Project's public purpose have found that the condemnation is rationally related to a public purpose.

STATEMENTS PURSUANT TO RULE 28.1

Rule 28.1 Statement for Respondent Park Tower Realty Corporation:

Emsworth Realty Corp;
Federal Tower Associates;
Federal Tower Construction Corporation;
499 Park Avenue Associates;
Fulton DeKalb Associates;
Madison Tower Associates;
Maiden Lane Associates, L.P.;
Park Avenue Tower Associates;
Park Avenue Tower Construction Corporation;
Park Avenue Tower Management Corporation;
Park Tower Associates;
Park Tower Consultants, Ltd.;
Park Tower Development Corporation;
Park Tower Federal Management Corporation;
Park Tower 55th Associates, L.P.;
Park Tower Leasing Corporation;
Park Tower Management, Ltd.;
Park Tower Properties, Ltd.;
Park Tower Security Corporation;
Park Tower Times Square Associates;
Park Tower Times Square, Ltd.;
Pearl-Tillary Company;
TDG Associates;
390 Tower Associates; and
Wall Street Tower Associates.

Rule 28.1 Statement for Respondent New York State Urban Development Corporation:

City-State Development Corporation;
New York Convention Center Development Corporation;
New York State Mortgage Loan Enforcement and Administration Corporation;
South Bronx Development Organization; and
Times Square Redevelopment Corporation.

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No. 85-1132

IN THE
SUPREME COURT OF THE UNITED STATES
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ROSENTHAL & ROSENTHAL, INC. and
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Petitioners,

-v-

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION; and GEORGE E. KLEIN,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

This brief is submitted on behalf of Respondents to urge denial of a petition for a writ of certiorari to the United States Court of Appeals

for the Second Circuit. The 42nd Street Development Project (the Project), a joint effort of the respondents New York State Urban Development Corporation (UDC) and the City of New York (City), was undertaken in an attempt to reverse the undisputed physical and economic decline of the West 42nd Street/Times Square section of New York City. (12a, 13a and 28a).* The Project consists of the planned renovation of nine theaters on 42nd Street, subway station improvements, a new hotel, a large wholesale merchandise mart, and four new office towers. One of the four towers will be built partially on the site now occupied by the Rosenthal Building. The land within the Project Area will be assembled by UDC through purchase or the use of the power of eminent domain. Construction of buildings will be undertaken by designated private developers. (13a and 29a).

---

* Unless otherwise indicated, numbers in parenthesis followed by the letter "a" are references to the Appendix in the Petition.

The Project's goals and public purpose were set forth by the City and UDC in the Final Environmental Impact Statement:

> First, to eliminate the blight and physical decay, as well as the crime and frightening street life, that now characterizes the West 42nd Street area;
>
> Second, to preserve and restore the area's extraordinary older theaters for theatrical and upgraded movie use, and, by so doing, to revitalize the project area as a theater and entertainment center serving tourists and all New Yorkers;
>
> Third, to develop the project area's commercial and retail potential to produce a lively, healthy street ambience and to support the City's policy (as expressed in the new Midtown Zoning) that encourages the movement of Midtown office construction westward;
>
> Fourth, to help upgrade public facilities in the project area, particularly the Times Square subway station;
>
> Fifth, to increase the project area's economic contribution to the City as a whole, both through increased revenues to the City and expanded private investment and employment opportunities; and
>
> Sixth, to restore the project area's role as a positive influence on the adjacent communities, notably the theater

> district, the garment center, and the Clinton residential neighborhood, and as a productive link among these communities and the expanding midtown office district.

G & A Books, Inc. v. Stern, 770 F.2d 288, 292 (2d Cir.), aff'g 604 F. Supp. 898 (S.D.N.Y.), petition for cert. filed sub nom., M.J.M. Exhibitors, Inc. v. Stern, 54 U.S.L.W. 3437 (U.S. Dec. 13, 1985) (No. 85-1032). The District Court found that "[t]he complaint itself refers to the broad public purposes behind this Project; to eradicate blight in Times Square and to revitalize the area culturally and commercially .... In fact, plaintiffs [Petitioners here] do not even plead that the project lacks a public purpose." (19a) (emphasis in original). Their argument is thus limited to the propriety of the taking of their building for inclusion in a valid public project. In essence, they attack what the Circuit Court termed, "a classic example of a taking for a public purpose or use within the law of eminent domain." (5a).

Chief Judge Motley, dismissing the Petitioners' complaint for failure to state a cause of

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action upon which relief may be granted, held:

> The Forty Second Street Project has emerged from the political process as a comprehensive attempt to address the implacable problems of crime and decay in Times Square. It addresses legitimate public purposes in a reasonable way, and the inclusion of the Rosenthal building, less than a block from the core area of blight, is certainly not irrational. Absent a particularized pleading of public fraud, or evidence of some other specific constitutional violation, that is enough to pass the scrutiny of this court.

(22a). The Court of Appeals affirmed, stating, "No serious argument can be made that the Forty-Second Street Development Project does not address legitimate public purposes in a reasonable manner." (4a). Accordingly, the Circuit, relying upon this Court's decisions in Berman and Midkiff, rejected Petitioners' speculative argument that their building is being taken for improper purposes. (5a).

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IN THIS MATTER.

This case arises out of the proposed condemnation by the New York State Urban

Development Corporation of thirteen acres in the West 42nd Street/Times Square area of New York City, constituting the Forty-Second Street Development Project. As not contested by Petitioners, and as found by the Urban Development Corporation, the courts below, and every other state and federal judge who has dealt with the Project, the condemnation is a means to eliminate the blight, physical decay, and crime that characterize this area, through commercial development and restoration of an historic theater and entertainment center serving tourists and all New Yorkers.

The Project is typical of the large scale urban redevelopment that has been uniformly approved by federal courts since this Court's decision thirty-two years ago in Berman v. Parker, 348 U.S. 26 (1954). The legal principles governing the use of the sovereign power of eminent domain have been clearly enunciated in an unbroken line of authority of this Court stemming from its 1896 decision in United States v. Gettysburg Electric R. Co., 160

U.S. 668, and most recently reaffirmed in Hawaii Housing Authority v. Midkiff, ___ U.S. ___, 104 S. Ct. 2321 (1984). The lower courts herein have been guided in their test of the Project by this Court's holding that "[a court] will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation,'" Midkiff, 104 S. Ct. at 2329 (quoting Gettsyburg Electric, 160 U.S. at 680).

The instant case is brought by the owners of a single property, within the Project boundaries, who seek to have their property exempted from the overall condemnation. (32a). They do not challenge the validity of the Project itself or its public purpose. Nor do they "seek to enjoin the Forty-Second Street Development Project in its entirety or any portion of that Project that does not involve the taking of the Rosenthal Building." (31a). This case amounts to nothing more than the routine application of a well-established legal standard to a

particular use of the power of eminent domain. As the petition presents no new issues of law or policy, and no occasion to review an innovative or unprecedented application of governmental power, it ought not to be granted by this Court.

The inappropriateness of this case for Supreme Court review is emphasized by the fact that the decisions below do not conflict with those of other Circuits. In fact, no Circuit Court since Midkiff has commented on or construed the scope of judicial review of a condemnor's declaration of public use or public purpose. In the single District Court opinion on this point since this Court last addressed it in 1984, the court applied the Midkiff formulation and reiterated the "palpably without reasonable foundation" language of Gettysburg Electric in upholding a condemnation determination. Pastan v. City of Melrose, 601 F. Supp. 201, 203 (D. Mass. 1985).

Further, it is significant that the finding of public use and public purpose has been upheld by

the Courts of the State of New York in seven decisions to date.* This Court has recognized that state court determinations are entitled to "great respect" on issues involving condemnations by state and local authorities in keeping with the tradition of avoiding federal involvement in local land use matters. Rindge Co. v. Los Angeles County, 262 U.S. 700, 705-706 (1923).

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* Matter of Clarose Cinema Corp. v. New York State Urban Development Corp., No. 24087 (N.Y. App. Div. 1st Dep't 1985), appeal dismissed, N.Y.L.J., Jan. 21, 1986, at 13, col. 7 (N.Y. Jan. 16, 1986) (renumbered 42 SSD 4); Matter of Jackson v. New York State Urban Development Corp., No. 24094 (N.Y. App. Div. 1st Dep't Oct. 22, 1985), appeal pending; Matter of Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp., No. 24089 (N.Y. App. Div. 1st Dep't Oct. 22, 1985), appeal pending; Matter of Three-O Realty Co. v. New York State Urban Development Corp., No. 24090 (N.Y. App. Div. 1st Dep't Oct. 22, 1985); Matter of Times Square Garage Ltd. v. New York State Urban Development Corp., No. 24091 (N.Y. App. Div. 1st Dept. Oct. 22, 1985); Matter of TSNY Realty Corp. v. New York State Urban Development Corp., No. 24092 (N.Y. App. Div. 1st Dep't Oct. 22, 1985); Matter of Waybro Corp. v. New York State Urban Development Corp., No. 24093 (N.Y. App. Div. 1st Dep't 1985), appeal dismissed, N.Y.L.J., Jan. 21, 1986, at 13, col. 5 (N.Y. Jan. 16, 1986) (renumbered 43 SSD 5).

THE COURTS BELOW PROPERLY APPLIED THIS COURT'S DECISION IN HAWAII HOUSING AUTHORITY V. MIDKIFF IN REJECTING PETITIONERS' CHALLENGE TO THE CONDEMNATION OF A PARTICULAR PARCEL IN A LARGE URBAN DEVELOPMENT PROJECT.

The precise ground stated by Petitioners for their application to this Court is the alleged failure of the courts below to follow the holding in Midkiff. Petition for certiorari pp. 8-11. Petitioners claim that in this case, the lower courts purported to "foreclose all judicial review." Petition at p. 9. This is simply wrong; both the District and Circuit Courts engaged in a full review of Petitioners' claims. The District Court, after a lengthy analysis of these claims and of Midkiff, reviewed the proposed taking to assure that it "addresses legitimate public purposes in a reasonable way." (22a). The Circuit Court noted with approval the "hundreds of pages of detailed findings" adopted by UDC and its earlier findings in Natural Resources Defense Council, Inc. v. City of New York, 672 F.2d 292, 294 (2d Cir.), cert. dismissed, 456 U.S. 920

(1982). That Court held that "No serious argument can be made that the Forty-Second Street Development Project does not address legitimate public purposes in a rational manner." (4a). Thus, both courts applied the exact standard of review required by Midkiff.

This standard is not an abdication of judicial review. Respondents agree that "there is, of course, a role for courts to play in reviewing the legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." Midkiff, 104 S. Ct. at 2329. Thus, an order amounting to a taking of private property solely for the benefit of another private person even with compensation will be struck down where the order is not claimed to be for a public use. Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403, 416-417 (1896); see also Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937).

Petitioners, who, as the District Court pointed out, did "not even plead that the Project lacks a

public purpose," asserted that their property was improperly included within the Project.* (19a). They asked the courts below, and now ask this Court, to sort and choose among the various parcels selected for condemnation. That type of judicial review of a public taking was clearly held by this Court to be inappropriate in Berman v. Parker.

In Berman, this Court held that the scope of judicial review of a determination to exercise the eminent domain power to reach general land-use planning goals is "an extemely narrow one." "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 348 U.S. at 32. For as the Berman court held:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public

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* Petitioners' statement in their petition, at page 4, that their property is "several blocks away" from the blighted area is, at best, disingenuous. Their property is within the boundaries of the Project, "less than a block away from the core area of blight . . . ." (22a).

> purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch . . . . It is not for the courts . . . to sort and choose among the various parcels selected for condemnation. The rights of the property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

348 U.S. at 35 - 36.

This holding of Berman has been uniformly applied by over half of the Circuits in limiting judicial scrutiny over the scope or extent of a taking. United States v. 91.69 Acres of Land, 334 F. 2d 229, 232 (4th Cir. 1973); United States v. 101.88 Acres of Land, 616 F. 2d 762, 767 (5th Cir. 1980); Amen v. City of Dearborn, 718 F. 2d 789, 798 (6th Cir. 1983), cert. denied, 465 U.S. 1101 (1984); United States ex rel. T.V.A. v. Two Tracts of Land, 532 F. 2d 1083, 1084 (6th Cir.), cert. denied, 429 U.S. 827 (1976); United States v. 416.81 Acres of Land, 514 F. 2d 627, 631 (7th Cir. 1975); Lower Brule Sioux Tribe of South

Dakota v. United States, 712 F. 2d 349, 353 (8th Cir. 1983); United States v. 80.5 Acres of Land, 448 F. 2d 980, 983 (9th Cir. 1971); see also United States v. 82.46 Acres of Land, 691 F. 2d 474, 477 (10th Cir. 1982); L'Enfant Plaza v. District of Col. Redev. Land Agency, 564 F. 2d 515, 517 (D.C. Cir. 1977).

The instant case thus resolves itself into no more than a claim that Petitioners' particular property ought not to be included in a large redevelopment project with a manifest public purpose. Such a claim presents no new, controversial, or important issue to this Court, and the petition should be dismissed.

PETITIONERS' OTHER SUGGESTIONS OF LOWER COURT ERROR ARE WITHOUT MERIT AND DO NOT JUSTIFY THIS COURT'S REVIEW.

Petitioners suggest in their petition for certiorari that under this Court's opinion in United States v. Carmack, 329 U.S. 230 (1946), reh'g denied, 329 U.S. 834 (1947), each individual condemnation decision in the Project -- whether to take or not to take -- is subject to judicial review as

to its arbitrariness or capriciousness. Carmack itself did not utilize this standard of review, and it is clearly not applicable to particularized takings since Berman v. Parker. As demonstrated above, the finding of public use or purpose for the Project precludes further judicial review of the specific inclusion of Petitioners' property in the condemnation. The lower court cases cited by Petitioners either go to review of public use or purpose, which is conceded in the present case, see United States v. 101.88 Acres of Land, supra; United States v. 58.16 Acres of Land, 478 F.2d 1055, 1059 (7th Cir. 1973); United States v. 1,108 Acres of Land, 25 F.R.D. 205, 209 (E.D.N.Y. 1960), or to review a claim that the condemnor exceeded the powers delegated to it by the legislature, a claim not made in the present case, see United States v. 2.9 Acres of Land, 554 F. Supp. 529, 531 (D. Mont. 1982); Hilliard v. Commonwealth of Pennsylvania, 308 F. Supp. 756, 760 (W.D. Pa. 1970), aff'd, 438 F.2d 92 (3d Cir. 1971); United States v.

0.08 Acres of Land, 246 F. Supp. 408, 410 (E.D. Tenn. 1965); United States v. Certain Land in the Borough of Manhattan, 233 F. Supp. 899, 901 (S.D.N.Y.), aff'd, 336 F.2d 1021 (2d Cir. 1964).

Petitioners also suggest that the courts below erroneously failed to hold that the power of eminent domain cannot be used as a substitute for the power of taxation. This is simply not an issue in the present case, where the public purpose of the Project, "elimination of the physical, social and economic blight that has affected the Times Square area of Manhattan for the past fifty years," is incontestable and in fact uncontested. (3a). This case does not therefore present the question of whether a taking solely for the purpose of raising revenue is beyond the constitutional power of a condemning authority, a question raised and not decided in regard to condemnation of land for the World Trade Center in Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N.Y. 2d 379, 240 N.Y.S. 2d 1, app. dism'd, 375 U.S. 78, reh'g denied, 375 U.S. 960 (1963).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROSENTHAL & ROSENTHAL INC. and
BROADWAY 41ST STREET REALTY CORPORATION,
Petitioners,

—v.—

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION; and GEORGE E. KLEIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents argue that the lower courts "engaged in a full review of Petitioners' claims" and suggest that the courts' "finding of public use or purpose precludes further review of the specific inclusion of Petitioners' property in the condemnation." Br. in Opp. at 10, 15. But this case was dismissed below on the ground that the complaint failed to state a claim on which relief could be granted. With no evidence before them, the lower courts made no findings of fact that the taking of petitioners' property is necessary to achieve the asserted public purposes of respondents' Project. In dismissing petitioners' allegations, the lower courts joincd a number of commentators (now including Professor Richard Epstein, *see* p. 4, *infra*) in

interpreting *Hawaii Housing Authority v. Midkiff*, ____ U.S. ___, 104 S.Ct. 2321 (1984), as effectively foreclosing all judicial review of condemnation decisions, notwithstanding *Midkiff's* express reaffirmation that there is a continuing, if limited, role for the courts in adjudicating the constitutionality of takings. *See Midkiff*, 104 S.Ct. at 2329.

Respondents make much of the Project's ostensible purpose of "cleaning up" the block of 42nd Street between Broadway and Eighth Avenue. No one would deny that improving social and economic conditions on this block is a matter of legitimate public concern. But respondents, like the courts below, ignore petitioners' specific allegations that the taking of their property is neither for this purpose, nor rationally related to it. Complaint, ¶¶ 20, 23 (29a-30a). Instead, petitioners allege that their building is being condemned solely for the private benefit and profit of respondent Klein, the politically well-connected real estate developer who will construct the massive new office complex included in the Project. Complaint, ¶¶ 21, 22 (29a-30a). This Court in *Midkiff* reiterated that the Constitution "forbids even a compensated taking where executed for no reason other than to confer a private benefit on a particular party." 104 S.Ct. at 2331. Petitioners have alleged that this is precisely such a case.

Berman v. Parker, 342 U.S. 26 (1954), a case on which respondents heavily rely, does not sustain the dismissal of petitioners' allegations. *Berman* stands for the propositions, not in dispute here, that urban renewal, even when conducted through a private developer, is a valid public purpose for condemning land, and that an agency may condemn the occasional sound building found in the midst of a blighted slum to carry out a comprehensive redevelopment plan. Those holdings, however, are inapplicable to the allegations of petitioners' complaint. Petitioners contend, and sought an opportunity to prove below, that the taking of their building is not necessary to achieve the redevelopment of neighboring properties on 42nd Street, but rather that respondents' Project has been enlarged beyond the area of blight to condemn peti-

tioners' property *solely* to make the Project more profitable for its private developers. Nothing in *Berman* condones such a misuse of the condemnation power for private gain.

Contrary to respondents' arguments, *Berman* is similarly inapplicable to the second legal theory on which petitioners' complaint relied, that respondents had acted arbitrarily and capriciously in condemning petitioners' structurally sound building on the edge of the Project, while leaving in private hands dilapidated and rundown buildings in the middle of the blighted area of 42nd Street within the Project's boundaries. While *Berman* held that a condemning agency may condemn every building, sound or unsound, within a blighted area, that is not in fact what respondents have done here. Instead, they have chosen to determine on a site-by-site basis which buildings to condemn and which to spare. Nothing in *Berman* suggests that these decisions can be made arbitrarily and capriciously, or on the basis of political favoritism.

In addressing petitioners' allegations that their building is being condemned solely to raise revenue to subsidize improvements elsewhere in the Project area, as a substitute for the taxation power, respondents repeat their conclusory assertion that their Project is for the public purpose of renewing 42nd Street, and argue that this issue is not presented by the case at hand. Yet even if respondents are taken at their word that the predominant purpose of their Project is to improve 42nd Street, rather than to benefit private developers, the issue remains whether the taking of petitioners' building is "rationally related" to this purpose, as the Constitution requires. *See Midkiff*, 104 S.Ct. at 2329. Although this Court appears never to have addressed the issue, the New York courts have recognized that the power to condemn may not be used as an alternative to the power to tax. Pet. at 14-15. If it were constitutionally permissible to condemn real property, not because the property is physically necessary for the construction of a public improvement, but because the condemnor wants to build a revenue-producing facility to subsidize other governmental activities, the power of eminent domain would

be enormously expanded. Literally any property, regardless of its location, could be condemned on this theory. This issue is of sufficient importance to be addressed by the Court on the merits, especially in a case such as this that involves a proposed taking of great size and significance to the nation's largest city.

Finally, respondents fail to rebut petitioners' basic point that by dismissing their complaint on its face, the lower courts necessarily rejected *all* of the legal standards that had been applied to adjudicate the constitutionality of takings prior to *Midkiff*. Under the standard applied by the lower courts, the courts may simply accept a condemning agency's assertion that its project is for a valid public purpose, and individual property owners are precluded from litigating whether the taking of their property has any rational relationship to that asserted public purpose. In his new book, Professor Epstein points out that the formulation of the "public use" standard in *Midkiff* may lead the courts to substitute their own speculation as to whether a project is for a legitimate purpose for the evidence that would emerge at trial:

> At a minimum the public use requirement is a strict limitation upon the power of government to take private property. That meaning is hardly captured by the present rendition [in *Midkiff*] for the expression "conceivable public purpose" suggests that the court, in its search for a "rational basis" can supply a purpose the legislature itself missed.

Epstein, *Takings: Private Property and the Power of Eminent Domain*, (Harv. Univ. Press 1985), at 162. While Professor Epstein agrees with the commentators cited in the petition that *Midkiff* has precluded any meaningful judicial scrutiny of condemnations, he decries this result, stating with specific reference to *Midkiff* that "the public use limitation . . . deserve[s] more respectful treatment than it receives today." *Id.* at 181.

Perhaps respondents, the lower courts, and the commentators are correct in their view that *Midkiff* conclusively fore-

closed judicial review of eminent domain decisions. But that is not what *Midkiff* itself said. Regardless of how the Court rules on the merits, the questions of what judicial role the courts are to play in eminent domain cases, and what standards the lower courts should apply in adjudicating the constitutionality of takings, are important issues that should be considered here. The petition for a writ of certiorari should be granted.

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